

1 UNITED STATES DISTRICT COURT
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WESTERN DISTRICT OF NEW YORK

IN RE: ROCK 'N PLAY SLEEPER) CASE NO.:
MARKETING, SALES PRACTICES, AND) 1:19-md-2903
PRODUCTS LIABILITY LITIGATION)
)

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10 CONFIDENTIAL
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15 DEPOSITION OF BRUCE SILVERMAN
16 VOLUME I
17 REMOTELY IN LOS ANGELES, CALIFORNIA
18 THURSDAY, OCTOBER 28, 2021
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22 REPORTED BY:
23 NATALIE PARVIZI-AZAD, CSR, RPR, RSR
24 CSR NO. 14125
25 JOB NO. 4846762

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14 DEPOSITION OF BRUCE SILVERMAN, VOLUME I
15 TAKEN ON BEHALF OF THE DEFENDANTS
16 REMOTELY VIA ZOOM VIDEO CONFERENCING, IN
17 LOS ANGELES, CALIFORNIA, BEGINNING AT
18 9:03 A.M. AND ENDING AT 7:22 P.M., ON
19 THURSDAY, OCTOBER 28, 2021, BEFORE
20 NATALIE PARVIZI-AZAD, CERTIFIED SHORTHAND
21 REPORTER NUMBER 14125.
22
23
24
25

1 A P P E A R A N C E S
2

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22 ALSO PRESENT:

23 ROB FENTON, VIDEOGRAPHER

24

25

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1 REMOTELY IN LOS ANGELES, CALIFORNIA

2 THURSDAY, OCTOBER 28, 2021, 9:03 A.M.

3

4 THE VIDEOGRAPHER: Good morning. We

5 are on the record. The time is 9:03 a.m.

09:03:01

6 Pacific Time. Today is October 28th, 2021.

7 Please note that the microphones are sensitive
8 and may pick up whispering, private
9 conversations, and cellular interference.

10 Please turn off all cellphones or place them

09:03:17

11 away from the microphones as they can interfere
12 with the deposition audio. Audio and video
13 recording will continue to take place unless
14 all parties agree to go off the record.

15 My name is Rob Fenton. I'm the notary

16 video technician with Veritext Legal Solutions

17 located in Los Angeles, California. The court

18 reporter is Natalie Parvizi-Azad from Veritext

19 Legal Solutions.

20 We are recording these proceedings

21 over videoconference technology due to

22 COVID-19. This is media unit one for the video

23 deposition of Bruce Silverman in the action

24 titled in re: Fisher-Price Rock 'n Play

25 Sleeper Marketing Sales Practices and Products

09:03:30

09:03:42

09:04:02

1 Liability Litigation. This deposition is being
2 taken on behalf of the defendants. And the NDL
3 number is 1:19-MD-2903.

4 I'm not related to any party in this
5 action, nor am I financially interested in the 09:04:21
6 outcome. Counsel and everyone present in the
7 room and everyone attending remotely will now
8 state their appearances and affiliations for
9 the record.

10 If there are any objections to 09:04:31
11 proceeding, please state them at the time of
12 your appearance, beginning with the noticing
13 attorney.

14 MR. KANNY: Good morning, everyone.
15 This is Matt Kanny with Goodwin Procter on 09:04:39
16 behalf of the defendants. I will be taking the
17 deposition today.

18 MR. EUBANK: My name is James Eubank,
19 at Beasley Allen, appearing on behalf of the
20 plaintiffs. And I will be defending the 09:04:55
21 deposition today.

22 MS. BASAR: My name is Demet Basar
23 from Beasley Allen, appearing on behalf of the
24 plaintiffs.

25 MR. EVANS: My name is Paul Evans with 09:05:05

1 Beasley Allen, appearing on behalf of
2 plaintiffs.

3 THE VIDEOGRAPHER: Thank you. Could
4 the court reporter please administer the oath.

5 THE CERTIFIED STENOGRAPHER: Please
6 raise your right hand to be sworn.

7

8 BRUCE SILVERMAN,
9 having declared under penalty of perjury to
10 tell the truth, was examined and testified as
11 follows:

12

13 EXAMINATION

14 BY MR. KANNY:

15 Q. Good -- good morning.

09:05:35

16 A. Good morning.

17 Q. Could you please state and spell your
18 full name for the record?

19 A. Yes. It's Bruce G. Silverman. That's
20 B-R-U-C-E, initial G, S-I-L-V-E-R-M-A-N.

09:05:43

21 Q. And Mr. Silverman, what is your date
22 of birth?

23 A. It's February 16th, 1945.

24 Q. And where do you currently reside?

25 A. I reside at 3168 Dona, D-O-N-A, Mema,

09:06:03

1 president at the time?

2 A. Yes. I was the vice president -- I
3 was made a senior vice president I think --
4 gosh. I -- I think it was when I first got to
5 Los Angeles.

10:47:35

6 Q. And you ultimately left in 1980
7 Ogilvy; correct?

8 A. I left at the very end of 1980,
9 literally on the last day of the year.

10 Q. Why did you leave?

10:47:50

11 A. I was recruited away by another agency
12 called Bozell & Jacobs.

13 Q. In all of your time at -- well, let
14 me -- you list on your client list for Ogilvy,
15 Mattel?

10:48:20

16 A. That's correct. That was at the Los
17 Angeles office.

18 Q. So your work for Mattel would have
19 been from 1977 to 1980?

20 A. Yeah. Very late '77 through 1980.

10:48:36

21 Q. What did -- what did -- what did you
22 personally do for Mattel?

23 A. Well, first of all, as executive
24 creative director, I -- I was responsible for
25 all of the creative work that the agency

10:48:59

1 produced including all of the work that we did
2 for Mattel. Mattel was our largest account at
3 Ogilvy LA. It happened to be one of the
4 largest accounts, at that time, that was
5 handled by Ogilvy & Mather on a global basis as 10:49:14
6 well as in the US. We were at the time
7 Mattel's only agency. So we were responsible
8 for all the girls' toys, things like Barbie and
9 baby dolls; all the boys' toys, things like Hot
10 Wheels, all the -- everything in between. So I 10:49:31
11 was responsible for the quality of the work.
12 I was responsible -- and I also -- I
13 created a lot of work. I created a -- a
14 campaign Barbie called "here comes Barbie fun."
15 It used the song from a movie called -- here 10:49:53
16 comes -- I'm trying to remember the name of the
17 movie. We -- we bought the rights to the music
18 and created a theme song. "Here comes Barbie
19 fun." And that was literally a full campaign
20 for Barbie. It was sort of a new idea that all 10:50:11
21 of the Barbie commercials and -- would relate
22 to each other, the various Barbie products. I
23 did some commercials personally that I really
24 got my hands -- got down on the ground and
25 did -- created some commercials for Hot Wheels. 10:50:26

1 I created commercials for a product called
2 Slime. It was a gooey product that came in its
3 own garbage can. Kind of fun.

4 I did -- I was very involved in the
5 launch of the series of products by a division 10:50:43
6 of Mattel called Mattel Electronics that made
7 handheld electronic games, and then later
8 introduced a product that I actually came up
9 with the name for called Intellivision, which
10 was a very, very early kind of game computer. 10:51:01

11 Q. Did Mattel, to your knowledge, own or
12 was affiliated with Fisher-Price at the time?

13 A. No. They acquired -- I don't quite
14 remember when they acquired Fisher-Price, but
15 it was well after I worked on the Mattel 10:51:31
16 account. In fact, Mattel had their own -- what
17 they called their preschool product line.

18 Q. Did Ogilvy ever work for Fisher-Price?

19 A. Not my knowledge. They didn't work
20 for Fisher-Price during the years I worked 10:51:49
21 there.

22 Q. Do you know what baby durables are?

23 A. Baby durables?

24 Q. Yes.

25 A. I'm not familiar with that. 10:52:00

1 A. I don't believe so at -- I -- I don't
2 think so. You know, it's a while ago. I've
3 have -- there were a lot of clients. In
4 paragraphs -- in paragraphs 13, 4, 15, you
5 know, I listed a few of the clients that -- 10:58:13
6 some of the better-known clients. But those
7 agencies had much longer client lists than
8 those that are listed in those paragraphs. But
9 I do reference --

10 Q. (Indiscernible). 10:58:24

11 A. -- I reference clients at the end
12 of -- end of Exhibit B.

13 Q. And -- and just so I'm clear, you
14 don't recall, as you sit here today, ever
15 working while you were at Bozell or BBDO West 10:58:40
16 for any client that manufactured or sold baby
17 durable products, as we defined it earlier?

18 A. I don't think so.

19 Q. And if you look at page 63 through 75
20 of your CV which lists your clients, there is 10:59:06
21 no client listed here on this list that is a
22 manufacturer or seller of baby gear durable
23 products; correct?

24 A. Factory To You stores, which was a --
25 it's a retail chain that Asher/Gould 10:59:41

1 represented, they may have sold some -- they
2 may have sold what you're calling durables --
3 baby durables. Big Lots may have sold baby
4 durables. I'm just looking just to see if
5 there is anything else, but I don't -- I 11:00:05
6 don't -- I don't have a category. Certainly, I
7 don't list a category of -- of baby durables.

8 Q. And for those two retailers that you
9 described, do you recall ever working with them
10 in connection with any advertising campaign or 11:00:38
11 any marketing campaign in connection with baby
12 durables?

13 A. I don't recall. Baby durable products
14 may have been included in some of the
15 advertising we did. The nature of those 11:00:50
16 clients was that you would frequently, you
17 know, show lots of stuff that was sold at the
18 store. So I really don't remember the specific
19 products all that much that were sold there.

20 Q. But you don't recall -- 11:01:02

21 A. I can tell you -- I mean, I know they
22 sold all kinds of things. It just -- you know,
23 I know they sold T-shirts and socks and all
24 kinds of things like that.

25 Q. Right. But you don't, as you sit here 11:01:18

1 MR. EUBANK: Well, then I would object
2 to form as vague and ambiguous as he just said
3 he thinks he does, which is not an affirmative
4 or a negative, so it's vague.

5 BY MR. KANNY:

11:30:29

6 Q. All right. So what we talked about
7 earlier today, Mr. Silverman, just to make the
8 record clear. Baby durables -- or I think you
9 mentioned baby gear as defined by some internal
10 documents that you saw from Fisher-Price and 11:30:40
11 Mattel -- products made for baby care and
12 specifically includes things like bassinets,
13 bouncers, swings, rockers, sleepers, and
14 gliders, but do not include items that are --
15 baby items that are disposable like diapers, 11:30:56
16 formula, and -- like diapers and formula and
17 clothes, I think I also said earlier.

18 So with that clarification, it's true,
19 isn't it, that from the beginning of your
20 career through today, you've never worked for 11:31:11
21 any company that manufacturers or sells baby
22 durable products?

23 MR. EUBANK: And I want to --
24 objection. Asked and answered.

25 THE WITNESS: I can't -- could you 11:31:23

1 restate the question so I know how to answer
2 yes or no?

3 MR. KANNY: Sure. Why don't we have
4 the court reporter read it back since I'm
5 getting a little tired here.

11:31:36

6 (Record read.)

7 THE WITNESS: I -- actually, I worked
8 on the Sears account. And they -- back then,
9 way back then, they probably sold that stuff.
10 But I -- I don't remember ever being involved
11 in doing advertising specifically for those
12 products. So other than that, I think the
13 answer would be -- to your question -- would be
14 yes.

11:32:27

15 MR. KANNY: Let's go to -- you guys
16 want to take a five-minute break?

11:32:43

17 THE WITNESS: I would welcome that.

18 MR. EUBANK: Sure.

19 MR. KANNY: Okay. Let's take a
20 five-minute break then. Thank you.

11:32:53

21 THE VIDEOGRAPHER: We are going off
22 the record at 11:33 a.m.

23 (Recess.)

24 THE VIDEOGRAPHER: We are back on the
25 record at 11:42 a.m.

11:41:31

1 mostly moms in the focus groups. We did some
2 groups with dads, but it was mostly moms. And
3 the moms would talk about the experiences they
4 were having, including the difficulties they
5 were having.

12:18:42

6 Q. Were any particular products
7 referenced in any of those focus groups?

8 A. Well, I mean, they -- you know, moms
9 would talk about bassinets, they'd talk about
10 cribs, playpens, all those kind of things.

12:19:06

11 They certainly weren't by brand. We didn't
12 talk about specific products. But consumers
13 talked about -- you know, in a focus group, the
14 name tries to define what it is. They tried to
15 focus on a particular subject, but the

12:19:19

16 subjects -- sometimes the discussion group
17 gets -- discussion takes interesting turns that
18 the group wants to talk about. And good focus
19 group moderators will try to steer the

20 conversation back to what we specifically want
21 to learn. "We" meaning the advertising people.

12:19:42

22 But they also know that it's important to let
23 the group go, otherwise the group becomes
24 unresponsive. That's just -- that's just the
25 art ever of moderating focus groups.

12:19:54

1 Q. So just to get a clear answer, none of
2 the focus groups' purpose was product specific?

3 MR. EUBANK: Objection. Asked and
4 answered.

5 THE WITNESS: The purpose of the focus 12:25:25
6 groups was not to find ways to help sell
7 products. That wasn't what the campaign was
8 about.

9 BY MR. KANNY:

10 Q. And, peripherally, there may have been 12:25:34
11 some discussions of baby products in those, but
12 that wasn't the purpose of any of those focus
13 groups?

14 MR. EUBANK: Objection. Asked and
15 answered three or four times now. 12:25:45

16 THE WITNESS: It's -- the purpose of
17 the focus groups was for -- to understand the
18 needs and wants of consumers that fell into the
19 target audience for the "Baby-Cal" campaign.

20 When you're interesting in finding out needs 12:26:04
21 and wants, you're going to the -- the
22 conversations -- what you learn is going to
23 include a lot of things that include the
24 products that consumers buy, both what you
25 would call "durables" as well as expendables. 12:26:18

1 BY MR. KANNY:

2 Q. Right. But the purpose of it wasn't
3 to find out the needs and wants of particular
4 products, was it?

5 A. It was not to find the needs and wants 12:26:30
6 for particular products, no.

7 Q. And this was about ten years before
8 the Rock 'n Play sleeper was ever sold?

9 A. That sounds right.

10 Q. If you go to paragraph 21 of your 12:26:57
11 report -- I'm sorry -- paragraph 40, which is
12 on page 13.

13 A. I'm sorry, 40?

14 Q. Yes.

15 A. Okay. 12:27:23

16 Q. It says:

17 "I was involved in dozens of packaging
18 projects during my long agency career for
19 many different kinds of products, including
20 beverages, condiments, automotive products 12:27:30
21 such as motor oil and, relevant to this
22 matter, products primarily purchased by
23 parents for use by children."

24 What packaging projects were you
25 involved with over your agency career -- 12:27:47

1 career, that dealt primarily with products
2 purchased by parents for use by children?

3 A. Let's see. Breakfast cereals, you
4 know, the -- kids' cereals such as Cocoa
5 Pebbles and Fruity Pebbles made by Post; 12:28:09
6 various candy bars like Hershey's and Reese's
7 Peanut Butter Cups, and some other Hershey
8 products; puppies, I actually did advertising
9 for a chain of pet food -- pet shops that was
10 owned by Mars, Incorporated. And one of the 12:28:38
11 things we found was that parents love to buy
12 puppies if -- when -- because they had
13 children. Toys, because I worked on Mattel.
14 And, from time to time, we would be --

15 have discussions with Mattel about ideas for 12:28:53
16 packaging for some of their new toys.

17 Particularly, in the toy business -- at least
18 when I worked on it -- there were staples like
19 Barbie and Hot Wheels. But there were also new
20 toys introduced every year that, basically, 12:29:09
21 might have lasted one season, sometimes two.

22 And so, a lot of packaging there. And -- and
23 some others. Soft drinks, other food products,
24 toaster pastries specifically designed for
25 kids. One was a product Nabisco made called 12:29:39

1 it's Krazy Glazy, with a K. It's "crazy" with
2 a K. And there was another one called Sooper
3 Cookies, S-O-O-P-E-R, K-O-O-K-I-E. And they
4 were toaster pastries for kids.

5 So it was an awful lot -- also 12:29:58
6 clothing products, things like that. So, you
7 know, an awful lot of -- you -- well, you don't
8 do much packaging for clothing. I take that
9 one back. But you certainly do for packaged
10 good products and things like that. 12:30:16

11 Q. So except for the toys for Mattel back
12 in '77 through '80 when Mattel didn't own
13 Fisher-Price, all of your packaging projects
14 that you just mentioned all relate to food and
15 soda and other consumables; correct? 12:30:31

16 A. Gosh. Let me think about that for a
17 moment. One of the things that we created --
18 well, it -- it was for fast food. You know,
19 we -- they still do it. They have promotion
20 items at fast food places. One of my clients 12:31:05
21 was Hardee's. And the campaign was very, very
22 kid oriented. You know, the advertising was
23 directed to both -- we had commercials very
24 specifically directed to kids and commercials
25 directed to adults where we were promising kind 12:31:28

1 A. Well, I'm not sure that -- you know,
2 I -- I do trademark work, so I -- the word
3 "confusion," at least in what I do in trademark
4 work has to do with source and issues with
5 that. But I think consumers would not 13:39:58
6 necessarily know that this product is a product
7 that they know and feel good about.

8 Q. Have you ever worked on any
9 advertising campaigns for companies that sold
10 any type of baby products? 13:40:12

11 A. Yes.

12 Q. What -- what companies?

13 A. Mead Johnson nutritional is the
14 manufacturer -- was and still is the
15 manufacturer of Enfamil. It's the leading baby 13:40:27
16 formula product in the world, actually. But
17 when I was working on it, in the early 1970's,
18 it was probably US only. And when I worked on
19 Mattel account, they had a preschool division.
20 I honestly don't remember the products. It's, 13:40:49
21 you know, a long time ago. And it wasn't the
22 most part of Mattel's business. But we
23 certainly did sell products that were at least
24 preschool products. I'm not sure how young
25 they went. 13:41:03

1 Q. Were they products for infants, if you
2 recall?

3 A. As I just said, I don't recall.

4 Q. And Mattel, at that time, was
5 primarily making only toys; is that right? 13:41:14

6 A. Back in those days, Mattel made toys
7 and they made games and they also sometimes
8 licensed the names of their products for other
9 purposes. And they had a line of preschool
10 products which, you know, my -- as best as I 13:41:37
11 can remember -- and I honestly don't remember
12 really well -- they were toys for preschool
13 children. I just don't remember to what -- how
14 young they went as far as their products go.

15 Q. If you look at -- and other than the 13:41:58
16 Enfamil and the Mattel preschool, any other
17 advertising campaigns you worked on that
18 involved products for babies or infants?

19 A. Yeah. Kimberly-Clark was in the
20 diapers business and I did some advertising for 13:42:25
21 diapers.

22 Q. Other than Enfamil with the Mattel
23 preschool and diapers, any other products --
24 any other campaigns you worked on that involved
25 product for babies? 13:42:40

1 A. I don't recall others.

2 Q. And I'm just going to clarify my own
3 question that it's the preschool -- I don't
4 think you understood what age those products
5 were or what whether those products were for
6 infants or for younger kids; right? 13:42:55

7 A. I didn't say I didn't understand. I
8 said I can't remember whether they went --
9 whether their product line included products
10 for infants or toddlers. 13:43:09

11 Q. Sure. If you look at paragraph 50,
12 it's where you reference the Enfamil baby
13 formula account.

14 A. Yes.

15 Q. And I just want to go to the
16 paragraph 27 now. At the bottom of that, you
17 refer to products ranging from financial
18 services to baby formula. Is the baby formula
19 referenced there the Enfamil? 13:43:22

20 A. Yes. 13:43:38

21 Q. And paragraph 40, the products
22 primarily -- so at the last two lines, it says,
23 "products primarily purchased by parents for
24 use by children." We already covered that
25 earlier today; right? 13:43:58

1 A. I think we did, yes.

2 Q. Okay. And if you now go to
3 paragraph 50, we talked about this a little bit
4 earlier today. But you said that you did focus
5 groups for Geisinger health system pediatric
6 practices?

7 A. Yes. We did it for pediatric
8 practices and other specialty practices and
9 that Geisinger --

10 Q. So when did you those?

11 A. 2000 it might have been as early as
12 2016. Definitely 2017, '18 and '19.

13 Q. And what were the purpose of those
14 focus groups?

15 A. The development of advertising. It
16 says it right in that paragraph.

17 Q. For what types of advertisements?

18 A. Advertising the -- the -- what do you
19 mean by "what types of advertising"?

20 Q. What was the -- well, let me ask a
21 separate question. Strike that question.

22 Did the focus groups help inform the
23 type of advertising you were composing for
24 Geisinger health system?

25 A. What the focus groups taught us was,

13:44:16

13:44:29

13:44:53

13:45:06

13:45:20

1 one, what -- what consumers were looking for.
2 And it was, again, it was mostly moms -- over
3 there in central Pennsylvania -- what they were
4 looking for from a pediatrician. You
5 know, our focus groups consisted of young 13:45:49
6 mothers. And, actually, not just young. You
7 know, mothers of -- everything from infants up
8 to teenagers. But what they were looking
9 for -- from -- for -- from pediatricians or
10 from a pediatrician's practice. 13:46:06

11 That -- Geisinger, at that time,
12 operated somewhere between 150 and 200 medical
13 offices. They called them clinics. And they
14 had specialty practices, in addition to, you
15 know, just primary care practices. So they had 13:46:24
16 specialists, including, you know,
17 pediatricians, cardiologists, et cetera.

18 And so, we were doing this to learn
19 what consumers were looking for, from a
20 pediatrician practice, in -- in that part of 13:46:42
21 Pennsylvania. Some of them were already
22 Geisinger patients. Some of them were not
23 Geisinger patients. Some of them didn't have
24 an ongoing relationship with a pediatrician.

25 It's -- it's the rust belt. A lot of those 13:46:58

1 people were pretty poor.

2 And -- and, you know, this was
3 something that Geisinger, at that time, really
4 wanted to put emphasis on -- into -- from a
5 marketing standpoint, was to build their 13:47:13
6 network, to build their system. They
7 operated -- they operated seven or eight
8 hospitals throughout Pennsylvania and southern
9 New Jersey.

10 And it's sort of a vertically 13:47:28
11 integrated business, health care. If you can
12 become a primary care physician or specialty
13 physician for a patient and that patient needs
14 to go to the hospital, they're going to end up
15 going to the system's hospital, more often than 13:47:41
16 not.

17 Q. So would it be fair that the primary
18 purpose of those focus groups was unrelated to
19 the sale of any baby durable products?

20 A. The purpose of those -- the ultimate 13:48:05
21 purpose of those focus groups was to develop a
22 advertising campaign to attract patients to
23 Geisinger's services.

24 Q. Do you recall whether, in any of those
25 focus groups, anyone mentioned the Rock 'n Play 13:48:18

1 sleeper product?

2 A. I do not -- I -- I really don't
3 remember. But I -- I -- I don't remember that
4 happening.

5 Q. And we talked about the -- the focus 13:48:45
6 groups you did for the -- was it baby cal,
7 baby -- I forgot the name of the project that
8 you did for the State of California back in the
9 90's?

10 A. The -- there was -- one was "baby 13:49:00
11 cal."

12 Q. Baby-Cal. In any of those focus
13 groups, did the -- did SIDS ever come up?

14 A. SIDS? Yes, SIDS absolutely came up.
15 By the way, there were two programs -- and I 13:49:17
16 was trying to remember the name of the other
17 program. The first was "baby cal," which
18 really was both prenatal and postnatal. And
19 then, the second was called First 5. And First
20 5 is still going. Every once in a while, I see 13:49:36
21 advertising for it.

22 So First 5 was, as the name implies,
23 programs designed to help parents do a better
24 job -- hopefully a better job of being involved
25 with their children during the first five years 13:49:51

1 I don't -- I -- I'm not sure if that was
2 alleged in the operative complaint or not. I
3 don't recall, but my focus -- as I've said, my
4 focus had to do with whether or not this was a
5 dangerous product for infants to sleep it. 14:49:16

6 Q. Do you recall any allegations in the
7 operative complaint that said that the Rock 'n
8 Play Sleeper was unsafe for all uses?

9 A. I don't recall.

10 Q. Have you ever heard -- heard of the
11 Rock 'n Play Sleeper prior to taking on this
12 assignment?

13 A. Actually, yes.

14 Q. When did you first learn of the Rock
15 'n Play Sleeper prior to taking on this
16 assignment? 14:49:44

17 A. The very first time I ever heard of
18 it, I have grandchildren and one of the
19 grandchildren, the oldest -- or excuse me, the
20 youngest of those grandchildren is now 14:49:56
21 7-years-old. And I remember my -- my daughter,
22 the mother of the -- the grandchildren
23 mentioning that she had heard about the Rock 'n
24 Play Sleeper because her younger son was colic
25 and she -- we talked about that. For some 14:50:22

1 reason, my daughter thinks I may know a lot
2 more about -- about how to handle babies than I
3 do. She likes to talk to her father.

4 Q. Did your daughter purchase the Rock 'n
5 Play Sleeper? 14:50:43

6 A. No, she did not.

7 Q. How did she receive the Rock 'n Play
8 Sleeper?

9 A. I just said she didn't bought -- she
10 didn't purchase it. 14:50:52

11 Q. Did she receive it as a gift?

12 A. Oh. She -- she did -- she has never
13 owned the Rock 'n Play Sleeper.

14 Q. Has she owned any other kind of
15 incline sleeper product? 14:51:02

16 A. Not to the best of my knowledge, no.
17 I don't think so. She's a -- she's a
18 registered nurse. She's a -- and she's a big
19 researcher.

20 Q. Do you know if she did any research in
21 connection whether or not to purchase a Rock 'n
22 Play Sleeper? 14:51:19

23 A. I do not.

24 Q. Do you know the reasons why she ended
25 up not purchasing the Rock 'n Play Sleeper 14:51:32

1 after she spoke with you?

2 MR. EUBANK: Object to the relevance.

3 THE WITNESS: I have no idea why she
4 didn't buy a product. She sometimes tell me
5 why she does buy products. She rarely tells me 14:51:45
6 about products she didn't -- didn't buy.

7 BY MR. KANNY:

8 Q. Other than the single conversation
9 that you had with your daughter some time ago,
10 have you had any other conversations with 14:52:00
11 anybody about the Rock 'n Play Sleeper?

12 A. I've had conversations about the Rock
13 'n Play Sleeper with the counsel for the
14 plaintiffs.

15 Q. Outside of this litigation, sir? 14:52:17

16 A. Outside of this litigation? No, I
17 have no reason to do that.

18 Q. Did you ever do any research in
19 connection with the Rock 'n Play Sleeper prior
20 to you being retained in this action? 14:52:34

21 A. I may -- well, I'd just -- I'd be
22 speculating. I can't -- I really can't answer
23 that.

24 Q. For what purposes would you have been
25 doing research on the Rock 'n Play Sleeper? 14:52:53

1 A. If I was -- if I did any research on
2 it, it would have been after my initial
3 conversation with the attorneys, which goes
4 back to January of 2020. I might have gone
5 online to see if I could learn little bit more 14:53:15
6 about the litigation. I frequently do that
7 when I'm contacted by lawyers about a case.

8 Q. You indicated that your daughter was a
9 registered nurse, and she does a lot of
10 research on buying products? 14:53:32

11 A. She -- she does a lot of homework,
12 yeah.

13 Q. What -- what kind of homework does she
14 do -- do she do in connection with purchasing
15 products, if you know? 14:53:41

16 MR. EUBANK: I'm going to say
17 objection to relevance and also objection that
18 this goes outside the scope of his assignment.
19 He was not asked to opine on what his
20 daughter's particular purchase habits are. 14:53:52

21 THE WITNESS: Yes and I -- what my
22 daughter does, I don't see it as being relevant
23 to my testimony today. And what I know of her
24 purchasing habits is between my daughter and I.
25 I don't believe that it -- that -- that 14:54:10

1 Fisher-Price or anybody else --

2 BY MR. KANNY:

3 Q. Your assignment was to --

4 A. -- as a -- has a right -- has a right
5 to ask me about that.

14:54:20

6 Q. You were asked to opine as to what a
7 reasonable consumer would consider material.
8 Do you consider your daughter to be a
9 reasonable consumer?

10 A. I think my daughter is a -- is an
11 average consumer, yes.

14:54:31

12 Q. And your daughter does a lot of
13 research in connection with purchasing
14 products; is that your testimony?

15 A. I -- I don't think said "a lot of."
16 My daughter is a careful shopper. Nurses don't
17 make that much money. And so, she's careful
18 about what she purchases. And where
19 appropriate, she tries to learn about the
20 products she buys. She's not much of an
21 impulse purchaser.

14:54:54

14:55:16

22 Q. And that's pretty consistent with the
23 reasonable consumer that you were evaluating in
24 connection with your assignment in this case;
25 right?

14:55:31

1 A. Not necessarily, no. Average
2 consumers looking -- my definition of a
3 reasonable consumer is an average consumer.
4 And my testimony is not about what average
5 consumers do, but rather what a -- what an 14:55:48
6 average consumer would take away from the
7 messaging conveyed by Fisher-Price about the
8 Rock 'n Play Sleep -- Sleeper. That's --

9 Q. Right.

10 A. That's very much --

14:56:04

11 Q. And --

12 A. That's very much my expertise.

13 Q. Right. And I -- I get that, and we
14 talked about path of purchase and now you said
15 that your daughter is a reasonable consumer and 14:56:14
16 she does a lot of research prior to purchasing
17 products. And so I do think it's relevant as
18 to what she does or doesn't do. Do you know
19 whether she did any research in connection with
20 deciding whether or not to purchase the Rock 'n 14:56:31
21 Play Sleeper?

22 MR. EUBANK: Matt, this whole entire
23 line of questioning is totally out of bounds to
24 get into what one particular person in his
25 family that's not connected with this at all, 14:56:44

1 what their particular decision-making process
2 is, because one person is not indicative of the
3 entire class of people or a reasonable
4 consumer, generally. I just don't see how this
5 is --

14:57:02

6 MR. KANNY: I -- are you going --
7 James, I'm running out of time. So are -- if
8 you're going to instruct, instruct. If not,
9 let me finish my questions. I think it's
10 relevant because he's already testified that
11 his daughter is like a reasonable consumer as
12 those that he was evaluating in this case.

14:57:11

13 MR. EUBANK: I -- I'll note for the
14 record and we -- we may file a motion to come
15 back later and strike this as getting -- A,
16 it's speculative as to what he thinks his
17 daughter might do because she is not the
18 reasonable consumer as a term, she is an
19 individual with her own individual drives and
20 motivations. Beyond that, this is digging into
21 the personal life and family matters of an
22 expert witness, not even a lay witness who is a
23 plaintiff or fact witness in the case. And
24 it's just totally out of bounds, in my opinion.

14:57:26

14:57:41

25 MR. KANNY: Okay. Well, instruct or

14:57:58

1 not instruct, but let's get going.

2 MR. EUBANK: I mean, it's -- it's --

3 it's not privileged and -- and it's not work
4 product, so I am bound not to instruct him not
5 to answer. I can just apologize to

14:58:10

6 Mr. Silverman and say I wish you didn't have to
7 answer, but please go ahead and answer.

8 MR: KANNY: The court reporter can
9 read --

10 THE WITNESS: So what question -- what
11 question do you want me to answer?

14:58:21

12 MR. KANNY: If the court reporter
13 could read the last question before the
14 narrative.

15 THE CERTIFIED STENOGRAPHER: Just a
16 moment.

14:58:32

17 (Record read.)

18 THE WITNESS: The answer is I don't
19 know.

20 BY MR. KANNY:

14:59:14

21 Q. She did contact you to talk about it;
22 correct?

23 A. She didn't contact me. We were
24 visiting their house, and the baby was crying.

25 Q. And what did you discuss about the

14:59:25

1 Rock 'n Play Sleeper with your daughter at the
2 time?

3 MR. EUBANK: Objection. Goes outside
4 the scope of his assignment.

5 THE WITNESS: Boy, is it outside the
6 scope. 14:59:34

7 My daughter asked if I ever had -- if
8 any of our -- if any of her siblings had --
9 were difficult -- posed a difficult problem to
10 my wife and I, you know, as far as, you know,
11 screaming, crying all the time. And my answer
12 was yes. And she said what did you do. And I
13 said we bought a baby swing. Now, this is a
14 long time ago. My children are all grown up.
15 BY MR. KANNY: 15:00:14

16 Q. Anything else that you can recall in
17 that discussion about the Rock 'n Play Sleeper
18 with your daughter?

19 A. No. I think she -- I think she
20 mentioned something called a Rock 'n Play
21 Sleeper, but that's as far as it goes. 15:00:21

22 Q. What is your understanding of
23 plaintiff's theory of liability in this case?

24 A. My understanding of liability? My
25 understanding of liability is -- is if 15:00:41

1 A. However, I have certainly been around.

2 Q. That wasn't an -- that wasn't a
3 question I answered -- your counsel, at the end
4 of this, can ask you follow-up questions.

5 A. Okay.

15:59:43

6 Q. Let's go to step one of the process.
7 You say, "identify and consider demographics
8 and psychographics"; correct?

9 A. Yes.

10 Q. What do you mean by "demographics"? 15:59:52

11 A. Demographics defined as sex, age,
12 income, race, educational level, and geographic
13 location.

14 Q. What do you mean by "psychographics"?

15 A. Psychographics is a marketing term, an 16:00:15
16 advertising term and it speaks to understanding
17 the lifestyles and values of various consumer
18 groups so that if you combine -- if you start
19 to understand who the target audience is
20 demographically, and then refine that based on 16:00:32
21 lifestyle and values, you have a very good
22 sense of who the -- who the -- who this
23 audience is, not as an audience, but rather
24 thinking about them as an average consumer of
25 -- within this target audience. 16:00:51

1 Q. What do you understand the
2 demographics and psychographics of the putative
3 class members of this case to be?

4 A. I think the demographics can be
5 anyone -- any -- any father and mother or 16:01:04
6 mother and father or maybe just mother of -- of
7 an infant child who has -- who is looking to
8 solve a particular problem and that is do I --
9 I want to get something for my infant child to
10 sleep in if they seem to need help. There are 16:01:25
11 certainly other things that babies can sleep
12 in, like bassinets. And from a demographic
13 standpoint, it really crosses almost anybody
14 who comes across -- in this case, comes across
15 this product and can afford to buy. 16:01:45

16 Q. Is it your understanding that only
17 mothers and fathers are part of the putative
18 class?

19 A. No. I would imagine that the putative
20 class would be anyone who had purchased the 16:01:56
21 product, though not necessarily for their own
22 use. I would imagine that, you know, this
23 product would be a good gift item for -- for an
24 expectant mother or newly -- or new parent.
25 Friends could be giving it. Relatives could be 16:02:16

1 giving it. Grandparents could be giving it.

2 So those people could be giving it as well.

3 It's a matter of finding out about it.

4 Q. Are purchasers of the -- on the

5 secondary market part of the putative class? 16:02:29

6 A. I don't know.

7 Q. Would they be -- would they fit in to
8 the same demographics and psychographics of a
9 purchasers who is purchasing it now?

10 A. As I said, in my opinion, the

11 demographic is were very, very broad here. You
12 know, it's anybody who has either had a baby or
13 wants to buy a, in essence, a gift for someone
14 who recently had a baby. The psychographics
15 are people who want to buy -- who kind of fit
16 in to wanting to buy a -- a product that will
17 solve a particular problem for -- for the
18 mother and father of an infant.

19 Q. You talk about, in step two, to apply
20 your knowledge of consumer purchasing behavior
21 as to the product or service being advertised
22 in this case. How did you apply your knowledge
23 in the way you specify in this particular case?

24 A. I apply my -- in this case, I apply my
25 knowledge of consumers who are buying products 16:03:38

1 for use by children or, for that matter, very
2 small children, infants, babies. What -- what
3 matters to me is it almost doesn't matter what
4 the product is. It's what how consumers think
5 about buying products for use by babies.

16:04:01

6 Babies are very precious. Parents,
7 grandparents, friends all recognize that. So
8 they want to buy products that are safe and
9 that will be helpful and useful, at least for a
10 period of time. Babies -- my understanding of
11 this product is that babies outgrow this
12 product at a certain point.

16:04:20

13 Q. And you have no experience, as we
14 talked about it extensively earlier today, in
15 durable baby products; correct?

16:04:33

16 A. Yes, I -- I -- I do. I just have a
17 lot of experience with parents.

18 Q. I'm sorry. Let me just make sure I
19 get my answer clear. We testified -- you
20 testified earlier that you have never worked on
21 a campaign or for manufacturers or retailers of
22 durable baby products; is that correct?

16:04:52

23 A. That's correct.

24 Q. Okay. So you have no experience in
25 connection with baby -- durable baby products;

16:05:12

1 correct?

2 MR. EUBANK: Objection. Vague. What
3 type of experience?

4 BY MR. KANNY:

5 Q. You can go ahead and answer. 16:05:22

6 A. That's correct.

7 Q. Okay. Let's go to step three.

8 "Evaluate" -- so say you, then, "evaluate the
9 strategic appropriateness and clarify --
10 clarity of the message as conveyed in the ad." 16:05:37

11 How do you conduct this evaluation?

12 A. The evaluation is conducted -- I --
13 number 1, I use -- I use my experience to do
14 that. The strategic appropriateness, if I was
15 working at an ad agency, I would have a
16 strategy that had been developed and approved
17 through the client. In working on expert
18 witness cases like this, I have -- I have --
19 generally speaking, and in this case

20 specifically, I have information that actually
21 came from the advertiser. And in this
22 instance, it's -- I was able to see that this
23 strategy was very, very clear. And the
24 strategy was to position this as a product that
25 could solve a problem for the parents of 16:06:27

1 infants that were keeping them awake at night.

2 So the strategy was all based on a problem, and
3 this product was the solution to this problem.

4 And -- and the --

5 Q. Would you agree with me --

16:06:46

6 A. And then the second part of that
7 sentence deals with clarity of messages
8 conveyed, and that's where my experience, you
9 know, basically is, is this message clear, is
10 it simple, is it likely to confuse a consumer.
11 And I -- all of those, at least in my opinion,
12 I believe that the messages here were clear as
13 a bell.

16:07:00

14 Q. Would you agree me that the intent of
15 the marketer doesn't necessarily mean that the
16 perception of the consumer is consistent with
17 that intent?

16:07:15

18 A. Would I agree with that? Are you
19 asking that in the abstract, or you asking
20 specific to this case?

16:07:32

21 Q. In the abstract.

22 A. There are certainly -- I have
23 experienced advertisers who insist on telling
24 consumers what they want to say, as opposed to
25 focusing in on determining on what consumers

16:07:48

1 want and need to hear or learn. So you can
2 sometimes get a disconnect. Those are --
3 typically, those are not very good clients.
4 And typically clients that insist on
5 advertising that works that way, more often 16:08:07
6 than not -- not -- not 100 percent of the time,
7 but more often than not the advertising that
8 results from that is not as effective as
9 another approach might be.

10 Q. The fourth step is you considered the 16:08:19
11 totality of the advertisement is likely to
12 engage the consumers. What standards do you
13 use to determine whether a consumer will find
14 the totality of the packaging engaging?

15 A. Well, again, it's based on my 16:08:38
16 experience. One of the things for sure in
17 advertising -- well, I guess I should never
18 say for sure. Consumers look at babies in
19 general. They like to see babies. But
20 especially people who are buying products for 16:08:55
21 babies like to see babies. And they like to
22 see babies portrayed in a way that they would
23 hope their baby would sort of fit. I think
24 everybody would love their baby to be pretty.
25 I think they would like their baby to look 16:09:13

1 happy. And especially I think for -- for
2 particularly infants, they would like to see
3 babies sleeping happily and like to see moms,
4 and sometimes moms and dads, enjoying that
5 experience. So that kind of -- there's story 16:09:28
6 appeal in that. And this is not an
7 intellectual reaction, it's an emotional
8 reaction that consumers have. And emotionally,
9 they say, oh, I'm attracted to that package.

10 Now -- 16:09:47

11 Q. Right. Mr. Silverman the question is
12 what standard? Not -- not --

13 A. Well, the standard --

14 Q. Do you have an objective standard that
15 you use in connection in determining whether 16:09:53
16 consumers will find the totality of the package
17 engaging, or are you basing it on your years of
18 experience and opinions?

19 A. I'm basing it on my years of
20 experience and what I was taught during my 16:10:05
21 years of experience.

22 Q. And different ad executives could have
23 different opinions regarding the
24 appropriateness of the packaging; correct?

25 MR. EUBANK: Objection. Calls for 16:10:19

1 me.

2 Q. And the highlighted sentence here,
3 again, credits you with coining the term "Don't
4 Leave Home Without It" for American Express; is
5 that correct? 18:26:09

6 A. Yes.

7 Q. Okay. Nothing further on those.

8 There are many questions about whether or not
9 you specifically worked in your marketing
10 career on infant and toddler or baby durable 18:26:28
11 products.

12 Do you recall those questions?

13 A. Yes.

14 Q. Well, not particularly working in
15 depth with marketing campaigns for baby 18:26:42
16 durables, you've done a lot of work for other
17 consumer products; is that correct?

18 A. Most --

19 MR. KANNY: Objection. Vague.

20 THE WITNESS: Most of my career has 18:26:52
21 been spent advertising consumer products and
22 services.

23 BY MR. EUBANK:

24 Q. And you testified earlier that a lot
25 of those included products that were marketed 18:27:03

1 to be either consumed or used by children?

2 A. That is correct.

3 Q. Okay. Would you say that it was
4 consistent across -- well, I'll ask you: Was
5 safety a concern or -- or was it material in
6 those categories that you worked in? 18:27:21

7 A. Yes.

8 Q. Any consumer products that you worked
9 in on marketing or advertising for where people
10 just didn't care about safety at all? 18:27:42

11 A. Gosh. That's an interesting question.
12 I -- I'm not sure how much consumers worried
13 about safety when opening a Pabst Blue Ribbon
14 or Hamm's or Lone Star Beer or eating an ice
15 cream cone at Baskin-Robbins. But in general, 18:28:05
16 consumers expect -- they want -- they want safe
17 products and they believe the products they buy
18 from well-known, well represented, effectively
19 rounded companies, generally speaking they
20 believe that -- those to be safe. 18:28:23

21 Q. And consumers across those consumer
22 products that you worked on, did they expect
23 the product to be usable for the purpose stated
24 on the label?

25 MR. KANNY: Objection. Calls for 18:28:44

1 speculation. Lacks foundation.

2 BY MR. EUBANK:

3 Q. Based on -- based on your experience.

4 A. In my experience, if -- when consumers
5 buy a product that has been positioned as being
6 for specific purpose or primarily for a
7 specific purpose, they expect that product to
8 deliver on that specific purpose.

9 Q. And along those lines when we -- when
10 there was a discussion multiple times about
11 Double Stuf Oreos?

12 A. Yes.

13 Q. Do you recall those discussions?

14 A. And you stated, if I recall, that that
15 the doubled stuff is a material representation
16 to consumers; correct?

17 A. I believe it was a material -- it was
18 an attribute that was a material benefit to
19 consumers.

20 Q. Okay. And does that attribute matter
21 to somebody who doesn't want a cookie?

22 A. No. It doesn't matter people that
23 don't want a cookie.

24 Q. So whether it's Double Stuf or not,
25 it's the Oreo part that first gets the consumer

18:28:52

18:29:09

18:29:19

18:29:31

18:29:43

1 STATE OF CALIFORNIA)

) SS.

2 COUNTY OF LOS ANGELES)

3

4

5 I, BRUCE SILVERMAN, HEREBY CERTIFY UNDER
6 PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF
7 CALIFORNIA THAT THE FOREGOING IS TRUE AND CORRECT.

8 EXECUTED THIS 19th DAY OF November,
9 2021, AT Studio City, CALIFORNIA.

10

11

12

13

14



15 BRUCE SILVERMAN

16

17

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25

1 ERRATA SHEET FOR THE DEPOSITION OF:

2
3 CASE NAME: IN RE: ROCK 'N PLAY SLEEPER
4 MARKETING, SALES PRACTICES, AND
PRODUCTS LIABILITY LITIGATION
5 CASE NUMBER: 1:19-MD-2903
6 DEPO DATE: THURSDAY, OCTOBER 28, 2021
7 DEPONENT: BRUCE SILVERMAN
8

9 CORRECTIONS

10 PG.	LN.	NOW READS	SHOULD READ	REASONS
11	58 4	table	label	Reporter error
12	70 8	until	through	Misspoke
13	78 16	principle	principal	Reporter error
14	91 25	advertisement	advertiser	Misspoke
15	92 6	advise	advice	Reporter error
16	134 20	interesting	interested	Misspoke
17	150 6	is	was	Misspoke
18	159 18	parent	part	Reporter error
19	168 4	advertising	advertisers	Reporter error
20	168 21	service	focus groups	Possibly misspoke or reporter error
21	185 14	financial	final	Reporter error
22	189 20	non-packing	non-packaging	Reporter error
23		CONTINUED ON FOLLOWING PAGE		

24 SIGNATURE DATE 11/19/2021

25 Page 368

1 ERRATA SHEET FOR THE DEPOSITION OF:

2
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8

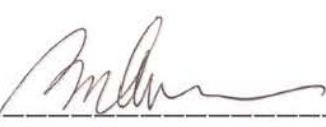
9 PAGE 2 OF CORRECTIONS

10	PG.	LN.	NOW READS	SHOULD READ	REASONS
11	190	12	Dennis	Kivetz	Reporter error
12	190	14	Dennis	Kivetz	Reporter error
13	254	22	product	package	Misspoke
14	269	22	insert "and" after "packaging"	Clarity	
15	274	12	demand	define	Reporter error

16 THIS SPACE INTENTIONALLY LEFT BLANK

17	308	10	correct	connect	Reporter error
18	325	19	rounded	branded	Reporter error
19	337	16	sleep	slept	Reporter error
20	353	16	markets	marketers	Reporter error

21
22
23

24 SIGNATURE DATE 11/19/2021

1 CERTIFIED STENOGRAPHER'S CERTIFICATE

2 STATE OF CALIFORNIA)

) SS.

3 COUNTY OF LOS ANGELES)

4

5 I, NATALIE PARVIZI-AZAD, HERBY CERTIFY:

6 I AM A DULY QUALIFIED CERTIFIED SHORTHAND
7 REPORTER IN THE STATE OF CALIFORNIA, HOLDER OF
8 CERTIFICATE NUMBER CSR 14125 ISSUED BY THE COURT
9 REPORTERS BOARD OF CALIFORNIA AND WHICH IS IN FULL
10 FORCE AND EFFECT. (BUS. & PROF. § 8016)

11 I AM NOT FINANCIALLY INTERESTED IN THIS
12 ACTION AND NOT A RELATIVE OR EMPLOYEE OF ANY
13 ATTORNEY OF THE PARTIES, OR OF ANY OF THE PARTIES.
14 (CIV. PROC. § 2025.320(A))

15 I AM AUTHORIZED TO ADMINISTER OATHS OR
16 AFFIRMATIONS PURSUANT TO CALIFORNIA CODE OF CIVIL
17 PROCEDURE, SECTION 2093 (B) AND PRIOR TO BEING
18 EXAMINED, THE DEPONENT WAS FIRST PLACED UNDER OATH
19 OR AFFIRMATION BY ME. (CIV. PROC. §§ 2025.320,
20 2025.540(A))

21 I AM THE CERTIFIED OFFICER THAT
22 STENOGRAPHICALLY RECORDED THE TESTIMONY IN THE
23 FOREGOING PROCEEDING AND THE FOREGOING TRANSCRIPT
24 IS A TRUE RECORD OF THE TESTIMONY GIVEN. (CIV.
25 PROC. § 2025.540(A))

1 I HAVE NOT, AND SHALL NOT, OFFER OR PROVIDE
2 ANY SERVICES OR PRODUCTS TO ANY PARTY'S ATTORNEY
3 OR THIRD PARTY WHO IS FINANCING ALL OR PART OF THE
4 ACTION WITHOUT FIRST OFFERING SAME TO ALL PARTIES
5 OR THEIR ATTORNEYS ATTENDING THE PROCEEDING AND
6 MAKING SAME AVAILABLE AT THE SAME TIME TO ALL
7 PARTIES OR THEIR ATTORNEYS. (CIV. PROC §
8 2025.320(B))

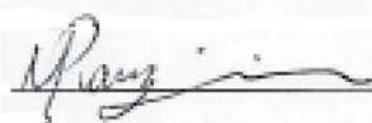
9 I SHALL NOT PROVIDE ANY SERVICE OR PRODUCT
10 CONSISTING OF THE CERTIFIED STENOGRAPHER'S
11 NOTATIONS OR COMMENTS REGARDING THE DEMEANOR OF
12 ANY WITNESS, ATTORNEY, OR PARTY PRESENT AT THE
13 PROCEEDING TO ANY PARTY OR ANY PARTY'S ATTORNEY OR
14 THIRD PARTY WHO IS FINANCING ALL OR PART OF THE
15 ACTION, NOR SHALL I COLLECT ANY PERSONAL
16 IDENTIFYING INFORMATION ABOUT THE WITNESS AS A
17 SERVICE OR PRODUCT TO BE PROVIDED TO ANY PARTY OR
18 THIRD PARTY WHO IS FINANCING ALL OR PART OF THE
19 ACTION. (CIV. PROC. § 2025.320(C))

20 DATED: NOVEMBER 5, 2021

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NATALIE PARVIZI-AZAD, CSR NO.14125